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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM BAIRD, *et al.*,

Petitioners,

v.

FRANCIS X. BELLOTTI, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals disregarded the twelve factors from *Hensley* v. *Eckerhart* (U.S. 1983), and the strong purposes of the Civil Rights Attorney's Fees Awards Act, in totally denying fees to prevailing counsel in *Bellotti* v. *Baird (I & II)*, who had delayed applying for fees until shortly after *White* v. *New Hampshire Dep't of Employment Security* (U.S. 1982)?

II. Whether the Court of Appeals was arbitrary in denying fees to Baird counsel in *Bellotti II* while awarding fees to Planned Parenthood counsel for the same services?

III. Whether the Court of Appeals should have applied an existing three year state statute of limitations on claims against the Commonwealth where there was no other statute, local rule, order, or practice requiring an earlier filing?

IV. Whether the Court of Appeals erred as a matter of law in upholding a motion to dismiss the fee petition, without a hearing, where no state claim of surprise was made, and the prejudice assertions rested on identical affidavits from state assistants who still resided in the area, but *claimed* loss of memory on facts as to which they would not be called as witnesses?

LIST OF PARTIES

William Baird, Mary Moe, Gerald Zupnick, M.D., Francis X. Bellotti.

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OPINIONS BELOW

The January 13, 1984, opinion of the Court of Appeals is reported. 724 F.2d 1032. It appears as Appendix A, *infra*.

The December 13, 1982, opinion of the district court is reported. 555 F.Supp. 579 (D. Mass. 1982). It appears as Appendix B, *infra*. Earlier procedural orders of the district court are in Appendix C.

The prior opinions of this Court in the same controversy are *Bellotti* v. *Baird*, 443 U.S. 662 (1979) *(Bellotti II)*, and *Bellotti* v. *Baird*, 428 U.S. 132 (1976) *(Bellotti I)*.

JURISDICTION

(i) The U.S. Court of Appeals issued the judgment to be reviewed on January 13, 1984.

(ii) There was no petition for rehearing.

(iii) Section 1254(1), Title 28, U.S. Code is the basis for certiorari jurisdiction in this Court.

STATUTES INVOLVED

The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, provides:

> In any action or proceeding to enforce a provision of Section 1981, 1982, 1983, 1985 . . . the court, in its discretion, may allow the prevailing party . . . *a reasonable attorney's fee* as part of the costs. (Emphasis added).

43 Mass. Gen. Laws Ch. 260, § 3A, at 139 (1959), provides:

> Petitions founded upon claims against the Commonwealth prosecuted under chapter two hundred and fifty-eight shall be brought only within three years next after the cause of action accrues. Added 3t. 1943, c. 566, § 1.

STATEMENT OF THE CASE

This is an appeal from the total denial of any civil rights attorney's fees to prevailing Baird counsel in the litigation from 1974-1979 culminating in *Bellotti (II)* v. *Baird*, 443 U.S. 622 (1979). Counsel submitted a detailed fee petition itemizing all time. The district court, without hearing any evidence from the State or Baird, granted a motion to dismiss all claims for fees and litigation expenses as untimely under 42 U.S.C. § 1988. *Baird* v. *Bellotti*, 555 F.Supp. 579 (D. Mass. 1982). The First Circuit affirmed as to Baird counsel, but awarded fees to Planned Parenthood (intervenor) counsel for similar services before this Court in *Bellotti (II)*.

This lengthy litigation has resulted in eight reported opinions. These include the opinion below, four opinions from the district court, one from the Supreme Judicial Court of Massachusetts, and two from this Court. The litigation is summarized below.

1. District Court: October 30, 1974 To May 20, 1975

On October 30, 1974, plaintiffs William Baird, Gerald Zupnick, M.D., and Mary Moe filed a class action complaint. The

district court held a four day hearing. The hearing was transcribed. Written briefs and exhibits were filed.

The district court issued its initial opinion on April 28, 1975. *Baird* v. *Bellotti*, 393 F.Supp. 847 (D. Mass. 1975). A majority held the statute unconstitutional.

2. First Appeal To Supreme Court

The Commonwealth appealed. This Court noted probable jurisdiction. Baird counsel filed a printed brief of fifty-seven pages, in response to lengthy comprehensive briefs from the Attorney General.

On July 1, 1976, this Court decided *Bellotti* v. *Baird*, 428 U.S. 132 (1976) *(Bellotti I)*. The Court vacated the lower court judgment and remanded for certification of appropriate state law questions to the Supreme Judicial Court of Massachusetts.

3. Remand To The District Court

Pending certification, Baird counsel applied to the district court on July 6, 1976 for a temporary injunction. The three-judge panel denied the injunction.

Baird counsel next applied here for a stay. Justice Brennan granted the stay on July 30, 1976. The full Court denied a motion to vacate that stay on October 18, 1976. 429 U.S. 892 (1976) (per curiam).

Upon the district court's request, plaintiffs proposed written questions fosr certification. The district court certified several questions on October 31, 1976. Baird counsel then prepared and filed a fifty-four page brief, and thereafter presented argument.

The Supreme Judicial Court of Massachusetts answered the certified questions in an opinion issued January 25, 1977. *Baird* v. *Attorney General*, 371 Mass. 741, 360 N.E.2d 228 (1977).

4. District Court Resumption Of Proceedings

On February 10, 1977, the district court granted a further stay, and enjoined the statute, as construed, in its entirety. 428 F.Supp. 854 (D. Mass. 1977).

The district court held a non-jury trial on October 17-18, 1977. On May 2, 1978, the court again held the abortion statute unconstitutional. *Baird* v. *Bellotti*, 450 F.Supp. 977 (D. Mass. 1978).

5. Second Appeal To Supreme Court (Bellotti II)

A direct appeal by defendants followed. This Court on July 2, 1979, affirmed the judgment of the district court. *Bellotti* v. *Baird*, 433 U.S. 662 (1979) *(Bellotti II)*. Baird counsel had filed a brief of forty-seven printed pages. Eight members of this Court held that the Massachusetts statute violated the Constitution. The Court denied defendants' motion for rehearing, on October 1, 1979, and plaintiffs became "prevailing parties" on October 25th, when the mandate was received below.

The foregoing proceedings are all well documented by briefs and transcripts.

6. The Fee Application

Baird counsel deferred their application for attorney's fees for several reasons. Inquiries to the clerk revealed no time limit or procedure. There was no applicable local rule. The district court had not set a time for filing. There was an analogous three year statute of limitations. Defendants were on notice, could not, and did not claim surprise. Moreover, the prior work was all on the record and could be evaluated as well in 1982 as in 1979.

The likelihood of prejudice to the Commonwealth also appeared minimal. They were being spared further work for a time and allowed to keep their money.

Respondent Bellotti was certainly aware of liability in this case. He co-authored an article in late 1978 criticizing *Bellotti I*

and complaining about the "disturbing implications" of the Fees Act. Bellotti & Schultz, *Federalism—The Massachusetts Experience*, 12 Suffolk U.L. Rev. 1225, 1233-37 (1978). Bellotti referred in the article to "at least twenty significant civil rights cases in which the commonwealth might be held liable for fees." *Id.* at 1236. Liability had been estimated through "an informal survey of cases in the Department . . ." *Id.* Respondent Bellotti referred to the same information in the Petition For Writ Of Certiorari, *Greenblatt* v. *King*, No. 77-684, at 9 & n.3. The survey did not emerge in discovery and was unknown until seen in the library of this Court.

Although Baird counsel had not been paid, they were not anxious to start up more major litigation without compensation for another several years.

In 1979 the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, had not been litigated extensively. Baird counsel had concern that some means would be found in this highly unpopular, controversial case to circumvent the Fees Act and deny all or most of the fee request. The possibilities were several: a 10 day rule, a "good faith" defense, a partial success argument, a reduction of rates, a denial of fees altogether to out-of-state counsel, a denial of fees because the case involved nonmonetary issues, or a denial of all fees during 1974-1977 when abstention was a major issue. The prospect of researching, briefing, and arguing each such issue without any compensation for another five years was discouraging.

Although the Fees Act was proposed "to ensure 'effective access to the judicial process' for persons with civil rights grievances," *Hensley* v. *Eckerhart*, *supra*, it was not working well until after the 1980 series of decisions by this Court. As to time for filing, the Act had no provision. The principal guide from this Court in 1979 was *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), a unanimous reversal of the First Circuit written by Justice Frankfurter.

Sprague was described in *White*, 455 U.S. 445, 451 n.13 (1982), also unanimous, as follows:

> In *Sprague* this Court considered the power of a federal court to award counsel fees pursuant to an application filed *several years* after the entry of a judgment on the merits . . . [T]he Court held that the petition . . . represented 'an independent proceeding . . .' The *passage of time* thus presented no bar to an award of fees. (Emphasis added).

In light of *Sprague*, in the absence of a local rule, and with the three year state statute of limitations in mind, Baird counsel in 1979 and 1980 could reasonably conclude that an immediate fee petition was unnecessary.

Decisions more specifically on laches also supported this conclusion of Baird counsel.

Guitierrez v. *Waterman S.S. Corp.*, 373 U.S. 206, 215-216 (1963), for example, rejected a laches defense. The moving party had not interviewed the witnesses who were available and had undertaken no discovery. Nor had the Commonwealth here. Relevant records were also available, as here. The plaintiff delayed from October 21, 1956, until January 9, 1959, before filing suit. This was outside the analogous statute of limitations. Baird counsel, however, are within the statute.

The present case is similar to *Guitierrez* in timing and the weakness of the laches claim of prejudice. See also *Cities Service Oil Co.* v. *Puerto Rico Lighterage Co.*, 305 F.2d 170, 171 (1st Cir. 1962) (delay not excusable but prejudice not shown); *EEOC* v. *Westinghouse Elec. Corp.*, 592 F.2d 484, 486 (8th Cir. 1979) (insufficient showing of prejudice); *EEOC* v. *American Nat'l Bank*, 574 F.2d 1173, 1175 (4th Cir. 1978) (insufficient showing of prejudice).

Counsel ultimately chose to await the outcome of *N.Y. Gaslight Club* v. *Carey*, 447 U.S. 54 (1980); *Maher* v. *Gagne*, 448 U.S. 122 (1980); *Maine* v. *Thiboutot*, 448 U.S. 1 (1980); and *Mahoning Women's Center* v. *Hunter*, 447 U.S. 918 (1980) (per curiam).

Counsel further awaited the disposition of *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982), *rev'g* 629 F.2d 697 (1st Cir. 1980) (hereafter cited as "*White*").

The 10 day rule of *White* would have barred any fee application filed from November 5, 1979, through the March 2, 1982, reversal of *White*. Although the First Circuit decided *White* on August 12, 1980, the case was briefed and argued much earlier. The panel included the judge who would sit in the district court on the *Baird* fee application. That judge joined the *White* opinion and would have dismissed any Baird fee petition filed after November 5, 1979, in any event.

The delay by Baird counsel was accordingly at least harmless, if not highly beneficial to all concerned. The delay avoided an additional appeal to the First Circuit on the 10 day question and another petition for certiorari to this Court to be combined with or decided in light of *White*.

The First Circuit and district court refused to examine the meticulously itemized fee petition or to analyze the complex considerations in any depth at all. On a bare motion to dismiss, without evidence, the district court made inferences and drew numerous conclusions that have utterly no basis in the record.

7. Grounds Of The Motion To Dismiss

The Attorney General's Motion to Dismiss alleged two grounds for denying all compensation to Baird counsel, namely:

> 1. Plaintiff's application for attorney's fees, which was filed almost four years *[sic]* after this [district] Court's final judgment in this case, is untimely or, alternatively, barred by laches.
>
> * * * [and]
>
> 4. This Court lacks jurisdiction to award attorney's fees for services performed in connection with the proceedings in the Supreme Judicial Court of Massachusetts. (A 98-99).*

The first ground misstates the relevant dates. On October 1, 1979, this Court denied rehearing after the second appeal in

*A = Appendix filed with First Circuit.

this case. 444 U.S. 887. The Clerk of the District Court made a last docket entry thereafter on October 25, 1979, stating: "Judgment received . . ." At that time plaintiff became the "prevailing party" under 42 U.S.C. § 1988, after almost five years of (uncompensated) litigation to the day.

Plaintiffs' counsel then filed their fee petition and extensive supporting documentation in April, 1982, less than two and one-half years after becoming the "prevailing party." The four year figure is misleading and immaterial.

Bellotti supported his contention for laches with two principal factual contentions made in very general terms: (1) Assistant Attorneys General who worked on this case were no longer employed; and (2) the storage files in Waltham, Massachusetts, were hard to retrieve.

The affidavit of Michael Eby stated in part:

> . . . [My] recollection of the precise nature, quality, and amount of the services rendered by various counsel for the plaintiffs . . . in this case is extremely limited. I therefore doubt that I could be of much assistance . . . in evaluating the reasonableness of . . . [the] applications for attorney's fees.

Former assistant attorney general Michael Meyer used identical boilerplate language, as did the similar affidavits of assistants Margot Botsford, and Stephen Rosenfeld. These are in the record and appendix filed in the Court of Appeals. (A140-148).

The Attorney General could not claim and did not offer proof of surprise. Nor did he allege any detrimental reliance. Significantly, he did not deny that sufficient information is available and in the file to allow judicial determination of a reasonable attorney's fee for all or most of the legal work done. See Affidavit of Harold Hestnes. (A 92).

The burden of proving "laches" rests upon the Attorney General. *Guitierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 215-16 (1963); *Gautreaux* v. *Chicago Housing Authority*, 690 F.2d 601, 611-12 (7th Cir. 1982). The district court did not

impose that burden, but instead accepted the boilerplate affidavits. The affidavits themselves are self serving. They do not state anything dispositive and certainly are not sufficient to cover the elements of a laches defense. Former assistant attorney generals are barely relevant witnesses.

On a motion to dismiss the allegations of plaintiff's petition and affidavits must be taken as established. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236-37 (1974). Here they were simply disregarded.

The entire laches defense rests on the general worded very similar affidavits identified above. The Attorney General explicitly declined "to conduct any further discovery with respect to the issues raised by their motion to dismiss" and was "willing to submit their motion to dismiss on the memoranda that [had] been filed with the Court." (A 110).

8. Facts Admitted By The State

The Attorney General, however, admitted in response to discovery requests that:

(1) He had "not since the filing of the application for attorneys fees requested copies of any materials for use in evaluating the application from . . . the Court files." (A 118) (Such a request might weaken any defense of lost records.)

(2) Every attorney who worked on the defense of this case is alive and working in the greater Boston area, except one who is in New York City (and was not a major participant in the litigation).

(3) No attorney who worked for the Attorney General in this litigation has refused to be consulted, although one would like to be compensated for his time. (A 118).

(4) "The Baird plaintiffs are not in violation of any local district court rule regarding the time for applying for an award of attorney's fees." (A 119).

(5) "When the Baird plaintiffs filed their fee petition they were not in violation of any time limit specifically ordered by the Court for such filing." (A 119).

(6) Between October 1979 and April 1982 the Attorney General never actually inquired whether Baird counsel would pursue their rights to be compensated under the Act of Congress in question. (A 121).

(7) Despite the defendants' motion to dismiss and memorandum filed June 16, 1982, which claimed laches, the defendant had not by that time even contacted assistants Behar, Eby, Rosenfeld, and Botsford concerning the claims in the fee petition or defenses to it. (A 122) (Each of those individuals had an important part in the litigation on the merits.) A 125, 129). Those significant admissions were disregarded by the courts below.

In addition, the Attorney General has not denied that the twelve *Hensley* factors can be evaluated on the basis of the fee application and supporting plaintiff affidavits. The law review article by Bellotti suggests that the fee claim has in fact been evaluated, and that the laches claim was purely an effort to escape responsibility.

9. Facts Documented By The Fee Application

The fee application, supporting affidavits, and expert affidavit of Boston attorney Harold Hestnes, present a comprehensive prima facie case for compensating Baird counsel for the several years of work they did. (A 36-92). All three Baird counsel affidavits detail the time expended by day and number of hours. (A 43-44, 47-52).

The expert affidavit of attorney Hestnes (A 92-97) filed July 16, 1982, illustrated the feasibility of evaluating the fee application from the standpoint of an experienced, independent federal litigator who had no prior contact with the specific case. Defendants have never disputed this affidavit.

Mr. Hestnes is a partner at Hale & Dorr. He "examined the court opinions, docket sheets, briefs, and attorneys' fees papers filed in this case." (A 94). He expressed his professional opinion in some detail on the reasonableness of the fees requested. (A 94-97).

His analysis followed the criteria now adopted by *Hensley* and showed that the laches defense is without merit. The delay does not preclude a professional evaluation. It only offers an excuse to disregard an Act of Congress. The courts below disregarded the affidavit completely.

10. Decisions Below

The district court expressed at length its view of some of the justifications offered for the delay. This examination did not include most of the reasons stated by Baird counsel. The Court of Appeals also focused entirely on its view of the delay, without considering the Act of Congress nor the strong position taken by this Court in cases such as *Hensley* v. *Eckerhart*, *supra*. This preoccupation with the delay led the lower courts into serious error with dangerous implications for busy litigating civil rights attorneys.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Disregarded The Twelve Factors From *Hensley* v. *Eckerhart* (U.S. 1983), And The Strong Purposes Of the Act Of Congress, By Totally Denying Civil Rights Attorney's Fees To Prevailing Counsel In *Bellotti* v. *Baird (I & II)* Who Had Delayed Applying Until Shortly After *White* v. *New Hampshire Dep't Of Employment Security* (U.S. 1982).

This Court in *Hensley* v. *Eckerhart*, 103 S.Ct 1933 (1983), examined the factors which determine a reasonable attorney's compensation award under 42 U.S.C. § 1988. The Court reviewed *Hensley* and vacated an Eighth Circuit judgment because "the District Court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award."

Here the First Circuit erred far more seriously, did not even cite to *Hensley*, and disregarded the twelve factors discussed by *Hensley* and emphasized in the legislative history. This error in approach dilutes an important Act of Congress and reverts to the era when fee availability depended upon the circuit in which one litigated.

The Sixth circuit has cautioned that the Civil Rights Attorney's Fees Awards Act of 1976 is *not*

> an equitable remedy, flexibly applied in those circumstances which the *court* considers appropriate, it is now a *statutory* remedy, and the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees.

Northcross v. *Board of Education*, 611 F.2d 624, 632 (6th Cir. 1979) (Emphasis in opinion), *cert. denied*, 447 U.S. 911 (1980), In *Northcross* the losing defendants objected to a 1974 fee application that sought compensation for work fourteen years earlier back to 1960. The Courts of Appeals found no proof of "prejudice or harmful effects . . . as a result of the plaintiffs' delay." *Id.* at 635. In that case, as here,

> [t]he prejudice, if any, has inured to the plaintiffs' attorneys who have provided years of service without compensation in hand. *Id.* at 635.

The fact that the attorney general's assistants have entered private practice in Boston is a minor inconvenience to the Commonwealth. It is not critically relevant to the determination required by *Hensley* and the Act of Congress. This is evident from an analysis of the twelve factors in *Hensley* and the relevance to them, if any, of delay.

As to *Hensley* factor (1), the "time and labor required," are itemized in daily detail by the time records and work product submitted with the fee application. 103 S.Ct at 1937 n.3.

(2) The "novely and difficulty of the questions," *Id.* n.3, can be evaluated from a number of perspectives. The place of *Bellotti (I) and (II)* in the jurisprudence of the right of privacy can be understood from the opinions of the district court and this Court.

(3) The "skill requisite to perform the legal service properly," *Id.* n.3, can be readily determined by evaluating the pleadings, briefs and opinions. This determination is no more difficult in 1984 than it was in 1979.

(4) The "preclusion of [other] employment . . ," *Id.* n.3, for Baird counsel is not a complex issue in this case. The docket sheets and opinions show the time pressures which had to take precedence over other legal business. This factor is clear and not diminished by the passage of time.

(5) The "customary fee," *Id.* n.3, is not a complicated matter to learn. Lawyers in Boston and elsewhere can establish their current market hourly rates.

(6) The largely contingent nature of the fee is a background fact that is the same in 1984 as in 1974. Time has not changed that fact. Baird counsel worked for many years with little pay.

(7) The "time limitations . . . ," *Id.* n.3, involved are well documented in the written material which is part of the files in this case. Emergency work to seek injunctive relief was a frequent occurrence in this litigation.

(8) The "amount involved and the results obtained," *Id.*, are clear from the written opinions in this litigation. Baird counsel achieved excellent results with maximum effort and minimum pay.

(9) The "experience, reputation, and ability of the attorneys," *Id*, n.3, can also be evaluated as well in 1984 as in 1979. Counsel affidavits documented their background. The briefs and transcripts reflect these to the extent they have bearing on the ultimate fee determination.

(10) The "undesirability" of the case can certainly be understood as well in 1984 as in 1974. Abortion has not become a less controversial subject with the passage of time.

(11) The "nature and length of the professional relationship with the client," *Id.*, is a further factor that can be evaluated as well as in 1984 as in 1979. It is a specific, known fact that was covered in the affidavits submitted by Baird counsel.

(12) Finally, "awards in similar cases," *Id.* n.3, are again a matter of written public record.

The claim by Baird counsel for fees from 1974-1979 can be evaluated quite satisfactorily by the district court if it fairly applies the stated factors from *Hensley* v. *Eckerhart*, 103 S.Ct. 1933 (1983). To refuse to do so would "yield harsh and unintended consequences." *White* v. *New Hampshire*, 455 U.S. 445, 452 (1982). The same district court had no difficulty awarding fees in *Brewster* v. *Dukakis*, 544 F.Supp. 1069, 1073 (D. Mass. 1982) (Freedman, J.), although the fee application was filed "more than two years after the entry of the Consent Decree and judgment." *Id.* at 1073. The court there had far more complicated calculations to do in awarding "$386,204.01 in attorneys' fees and costs." *Id.* at 1071. However, that court rejected the Attorney General's vague claims of prejudice because "all of these individuals are still employed in eastern Massachusetts, and are readily available for discussion and consultation." *Id.* at 1073. The same is true here. The Attorney General's boilerplate affidavits from peripheral potential witnesses have little bearing on the overall fee claim. They should not be allowed to undercut a substantial claim under an important Act of Congress. The law review article by Bellotti even suggests that the fee claim in this case has already been evaluated.

II. The Court Of Appeals Arbitrarily Denied Fees To Baird Counsel In *Bellotti II* While Awarding Fees To Planned Parenthood Counsel For The Same Services.

A most serious departure from the neutral application of Section 1988 standards occurred in the arbitrary discrimination against Baird counsel in favor of Planned Parenthood counsel for the same type of services.

The Court of Appeals awarded fees for the briefing and argument by intervenor Planned Parenthood counsel in *Bellotti II* before this Court, but not the same work by Baird counsel.

Both PP and Baird counsel wrote briefs and prepared for argument in the same time frame. Both counsel argued on the same side of this Court on the same day. Yet, PP counsel will be paid. Baird counsel, who chaired the litigation *pro bono publico* from 1974 through 1979, will be denied all compensation. This singling out of Baird counsel undermines the purposes of § 1988 in a particular invidious way. The paid attorney is local from a large Boston firm. The majority of services by Baird counsel were *pro bono* by out-of-state counsel hired because of the highly controversial nature of the litigation. This is the case with much § 1983 litigation in the fields of voting and education. The Court of Appeals' approach sets a precedent for discouraging civil rights' specialists from enforcing other important legislation beyond their home states.

The reasons for awarding fees to Planned Parenthood apply with equal force to almost all of the services performed by Baird counsel from 1974-1979.

Proceedings in this Court involved petitions, briefs, and transcribed arguments. A fair minded trial court can evaluate the reasonableness of a § 1988 fee request from the record of proceedings, including the detailed time records of counsel and written work product.

The same is true with the first appeal to this Court in 1976, *Bellotti* v. *Baird*, 428 U.S. 132 (1976) *(Bellotti I)*. The same records exist. The supposedly faded memories of former assistant attorneys general are no bar to evaluating the reasonableness of the detailed fee petition in *Bellotti II* or *Bellotti I*.

Similarly, work on remand from *Bellotti I* to the Supreme Judicial Court of Massachusetts is well documented and preserved. Baird counsel filed a brief and argued the certified questions. The hearing was televised for use at a local law school. Again, a fair minded trial court could evaluate the reasonableness of those services. Claims of faded memories by adverse counsel are of the most minimal relevance, and do not justify disregarding an Act of Congress.

The same analysis applies to proceedings in the district court. Briefing, argument, and testimony are all well documented. A fair minded trial court can evaluate the reasonableness of the entire fee claim, even without any prior contact with this litigation. That is to be the case with Planned Parenthood. An independent judge from the same district has now been assigned to set those fees, although not involved previously in any phase of this litigation. App. C, *infra*, at 32a. The determination is no different from that routinely made by other courts in assessing fees for litigation that has lasted five or ten years. E.g., *Brinkman* v. *Gilligan*, 697 F.2d 163 (6th Cir. 1983) (per curiam), *aff'g* 557 F.Supp. 610 (S.D. Ohio 1982) (delay of two years five months excused where school case lasted from 1972-1979); *Gautreaux* v. *Chicago Housing Authority*, 690 F.2d 601, 603-04, 613 (7th Cir. 1982) (". . . proceedings that have lasted sixteen years . . ."); *Mills* v. *Eltra Corp.*, 663 F.2d 760 (7th Cir. 1981) (fees awarded for services rendered in 1969).

In sum, the Court of Appeals seriously departed from accepted judicial procedure by discriminating against Baird counsel in favor of Planned Parenthood for work of the same nature. This Court should grant certiorari, vacate the judgment below, and remand with instructions to set fees for Baird counsel for services performed from 1974-1979, and to date.

III. The Court Of Appeals Decision Is Inconsistent In Principle With Decisions By The Sixth And Seventh Circuits.

The First Circuit has been the most reluctant to allow counsel a substantial time interval to recover from protracted, uncompensated litigation before devoting additional weeks to a fee petition. This Court has twice unanimously reversed the First Circuit in matters of delayed fee applications. *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445 (1982); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939).

The Sixth and Seventh Circuit approaches are markedly different when asked to enforce the Section 1988 Act of Con-

gress and award compensation for work dating back many years. Baird counsel cited these Sixth and Seventh Circuit cases below, but they were totally disregarded and not even mentioned in the First Circuit opinion.

The most direct conflict involves the Dayton, Ohio, school desegregation case, *Brinkman* v. *Gilligan*, 557 F.Supp. 610 (S.D. Ohio 1982), *aff'd*, 697 F.2d 163 (6th Cir. 1983) (per curiam). There prevailing counsel delayed two years and five months in applying for fees. Finally, after a *sua sponte* court order, counsel applied for fees involving work from 1972-1979. The amount of work and sums involved were more complex than in *Bellotti I & II*. Yet, the Sixth Circuit had no difficulty affirming a substantial compensation award under Section 1988.

Conflict with *Brinkman* exists on the procedure for dealing with delay and the feasibility of calculating fees for services performed many years before. The federal court in *Brinkman* determined in 1982 a reasonable fee for work from 1972-1979. The federal court in *Baird* v. *Bellotti*, 555 F.Supp. 579 (D. Mass. 1982), declined to do so even though the fee application was detailed and extensive documentation was submitted. The Boston federal court determined that no fee at all was the better approach. This result not only sets aside an Act of Congress and disregards the refined analysis of *Hensley* v. *Eckerhart*, *supra*. It also conflicts with the Sixth Circuit's willingness to enforce Section 1988 even to the point of instructing counsel to file a fee application.

The conflict in principle with the Sixth Circuit is also illustrated by *Northcross* v. *Board of Education*, 611 F.2d 624, 632 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). There fees were sought in 1974 for work that dated back to 1960. The Sixth Circuit in *Northcross* awarded substantial compensation and enforced the Fees Act, although interim fees had not been sought earlier.

Further, there are conflicts in principle with Seventh Circuit decisions awarding fees for legal work done ten years or more

before a fee petition was filed. E.g., *Gautreaux* v. *Chicago Housing Authority*, 690 F.2d 601, 603-04, 613 (7th Cir. 1982) ("proceedings that have lasted sixteen years . . ."); *Mills* v. *Eltra Corp.*, 663 F.2d 760 (7th Cir. 1981) (fees awarded for services rendered in 1969).

Even within the First Circuit fees have been awarded in litigation dating back ten years. *David* v. *Travisono*, 621 F.2d 464, 465 (1st Cir. 1980) (per curiam). Moreover, a delay of "more than two years" in filing for fees was not considered prejudicial in *Brewster* v. *Dukakis*, 544 F.Supp. 1069, 1073 (D. Mass 1982) (not appealed). The *Brewster* decision, disregarded below, was delivered by the panel member who in 1974 convened the three judge court to hear the *Baird* v. *Bellotti* litigation. This suggests that the denial of all fees to Baird counsel for their 1974-1979 work was not only erroneous, but entirely a fortuity of assignment.

Review by this Court would clarify the conflicts in approach among the circuits. The Sixth and Seventh Circuits appear far more faithful to the guidelines set by this Court in *Hensley* v. *Eckerhart*, *supra*, and by Congress in the Fees Act. This Court should resolve the conflict by summarily vacating the judgment below and remanding for a fee determination consistent with *Hensley*.

IV. The Court Of Appeals Should Have Applied An Analogous Three Year State Statute Of Limitations On Claims Against The Commonwealth, Because There Was No Other Statute, Local Rule, Order, Or Practice Requiring An Earlier Filing.

This Court has held that in § 1983 actions an analogous state statute of limitations should be applied when there is no specific federal provision. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 484 (1980) (three year New York rule applied).

Here counsel had no guidance on timeliness from § 1988 itself. The district court never set the fee matter down for consideration. The attorney general never moved toward

settlement nor any final disposition of the remaining fee problem. There was no local rule on fee petitions nor any known custom, although a similar two year delay against these same state defendants had been held non-prejudicial in *Brewster* v. *Dukakis*, 544 F.Supp. 1069, 1073 (D. Mass. 1982) (not appealed) (interim fees awarded to counsel who "filed their application for attorneys' fees . . . more than two years after the entry of . . . judgment.")

However, there was Section 3A of Mass. Gen. Laws Ch. 260:

> Petitions founded upon claims against the commonwealth prosecuted under chapter two hundred and fifty-eight* shall be brought only within three years next after the cause of action accures. Added St. 1943, c. 566 § 1.

Section 3A has applied in numerous analogous circumstances since 1943. It should have been applied to the present "claim against the commonwealth . . ."

This Court should grant certiorari and summarily reverse in light of *Tomanio* and the analogous three year statute of limitations. Since the fee claim arose in October of 1979, the post-*White* filing was timely, whether or not the pendency of *White* tolled the statute.

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*Chapter 258 also includes a three year period of limitations. 42 Mass. Gen Laws Ann. C. 258, § 4, at 249 (Pkt. Pt. 1983-84).

CONCLUSION

For the reasons set out, this Court should grant the petition, vacate the judgment below, and remand with directions to apply the criteria of *Hensley* v. *Eckerhart*, *supra*, in setting a "reasonable attorney's fee" in accordance with the Congressonal intent embodied in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.

Respectfully submitted:

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APPENDIX

APPENDIX A

United States Court of Appeals

For the First Circuit

WILLIAM BAIRD *et al.*,
Plaintiffs, Appellants,

v.

FRANCIS X. BELLOTTI, *et al.*,
Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Bailey Aldrich,* *Senior U.S. Circuit Judge*]

Before
Campbell, *Chief Judge*,
Skelton,** *Senior Circuit Judge*,
and Breyer, *Circuit Judge*.

January 13, 1984

CAMPBELL, *Chief Judge*. Planned Parenthood League of Massachusetts (PPLM) was an intervening plaintiff, and William Baird was an original plaintiff, in protracted civil rights litigation which was commenced in 1974. They were almost entirely successful throughout, and they won the final round on July 2, 1979, when the Supreme Court ruled 8-1 in their favor. *Bellotti* v. *Baird*, 443 U.S. 622 (1979). On October 1, 1979, the Supreme Court denied rehearing, 444 U.S. 887. Eight months

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*Of the First Circuit, sitting by designation.

**Of the Federal Circuit, sitting by designation.

later, on May 29, 1980, PPLM filed its motion for attorneys' fees under 42 U.S.C. § 1988 in the district court; and 30 months later, Baird filed his motion for attorneys' fees. Defendants thereafter sought dismissal of both motions on grounds of laches, and the district court granted dismissal after hearing. This appeal followed.

The district court, Senior Circuit Judge Aldrich, sitting by designation, set out findings and rulings at length in *Baird* v. *Bellotti*, 555 F. Supp. 579 (1982), which we do not repeat but which provide a necessary background to this opinion.

The basic issue on appeal is whether the district court abused its discretion in denying the fees. This in turn depends on whether Baird's and PPLM's lengthy delays in moving for fees caused sufficient prejudice to warrant the court's denying them. In *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 455, 454 (1982) *(White)*, the Court indicated that section 1988's authorization to award fees "in [the] discretion" of the court "will support a denial of fees in cases in which a postjudgment motion unfairly surprises or prejudices the affected party." The delays in the present case of eight and thirty months were plainly unreasonable. But as the district court said, "[t]he concept of laches is that a party is to be forgiven his unreasonable delay, provided it has had no prejudicial consequences." 555 F. Supp. at 585.[1] While fees under section 1988 are expressly a matter for the district court's discretion, and while ordinary principles of laches may be somewhat tempered, *see* note 1, the Supreme Court's refer-

[1] The district court made the perceptive observation that there exists a difference between the application of laches to bar the bringing of a cause of action (the usual case) and the application of laches to support a denial of attorneys' fees. A fees request "although separate, is collateral to, and closely connected with, judicial proceedings that have otherwise terminated . . . The advantages of a continuum, and the loss from interruption, differ from laches in the bringing of a cause action." 555 F. Supp. at 586. For this reason, the district court felt that prejudice should arise more quickly in fees applications than in the more usual case. We agree

ence in *White* to "unfair surprise" and "prejudice" indicates that prejudice remains a significant factor. *Compare Fulps* v. *City of Springfield*, 715 F.2d 1088 (6th Cir. 1983) (affirming finding that eight-month delay in requesting fees was "patently untimely" but remanding for determination of actual prejudice.

In the present case, after discussing a number of prejudicial factors created by the delays, the court found as to Baird's request "a strong probability of prejudice" and as to PPLM's "a probability of substantial prejudice." It went on to ask "whether this advance finding can be sufficient, or whether the court must "conduct a necessarily elaborate fee hearing, and then determine whether, in fact, there was prejudice." 555 F. Supp. at 589. Answering its own question, the court rejected a further proceeding, reasoning

> a party guilty of an unexcused substantial delay should not be entitled to impose that great burden, and in this instance the court [would impose] the burden on itself and other litigants as well as . . . on the defendant.

Id. The question, therefore, is whether the prejudicing factors found by the district court were sufficient to warrant its decision to deny fees. To answer, we shall consider each applicant's situation separately.

a. William Baird

The fees claimed by Baird's attorneys were for services from 1974 onward, involving about $250,000. The district court pointed out that the burden of establishing excessiveness, or countervailing, or negative aspects, of a plaintiff's "lodestar" figure is normally on the defendant. And the judge is required to make very specific analysis and findings if he departs from the plaintiff's lodestar. 555 F. Supp. at 586. It follows that loss of witnesses or their memories, or loss of the judge's own memory, is likely to be particularly harmful to the defendant. The district court thus took quite seriously the Attorney General's assertion that,

> during [Baird's] delay, his last knowledgeable assistant had, indeed, left, very possibly diminishing the interest and perhaps availability, of departed employees with respect to affording sufficient time for reviewing files and refreshing recollections . . . .

555 F. Supp. 586. The departed assistant was Garrick Cole. In an affidavit, Cole stated that his present position as an associate at a private law firm "requires a complete commitment of my professional time. As a result it would be somewhat difficult and burdensome for me to assist the Department of the Attorney General in opposing plaintiff's and plaintiffs-intervenors' fee applications . . . ."

Cole had worked on the underlying case from September of 1975 to August of 1980, and it appears that he had the longest exposure to, and the best overall picture of, the litigation. Had Baird moved for a fee several months after denial of rehearing in October 1979, Cole would have been available to render full assistance to the Commonwealth. Given the amount claimed, the variety of services covered, and the complexity and duration of the litigation, we think Cole's presence was key. Although he remains in Boston, and can presumably be specially engaged by the Attorney General, the court could properly find that his availability will be more circumscribed than when he was the Attorney General's employee, to the prejudice of the Commonwealth.

Though Cole does not assert any memory loss, other former Assistant Attorneys General do. For example, Stephen Rosenfield, who worked on the case from 1975 to 1977, and left the Attorney General's office in August of 1979, calls his recollections of the nature, quality, and amount of services rendered by opposing counsel "extremely limited," as does Michael Meyer, who worked on the case from May 1977 to February 1979. Meyer left in October of 1979. While Meyer and Rosenfeld had left before the Supreme Court denied rehearing on October 1, 1979, the district court could properly determine that their recollections and those of other assistants would have been better if the hearing had been held in the

winter or spring of 1980, as would have happened had a timely motion been filed.

Baird downplayed the departure of the assistants, arguing that it is for the court to evaluate the reasonableness of the fees requested. Having participated in most of the proceedings for which fees were sought, the district judge agreed that his own estimate of the value of the services was of importance, but pointed out that in at least one instance where he had "reservations" about the quality of Baird's representation, he could no longer recall the specifics. Considering only prejudice to the defendant, not prejudice to the judiciary,[2] the court observed that it would be to "defendant's cost" were it to fail to remember "events or circumstances rebutting or diminishing any of plaintiffs' claims, which they assert to be prima facie until discounted." 555 F. Supp. at 587. We agree that loss of a participating judge's memory is another element of prejudice in a situation such as this.

Baird argues that he should not be charged with a 30-month delay because after our decision in *White* v. *New Hampshire Department of Employment Security*, 629 F.2d 697 (1980) *(White I)*, came down in August 1980 (holding that attorneys' fees requests must be filed within ten days), it would have been futile for him to have filed his motion until our decision was reversed by the Supreme Court. That argument fails on two counts.

First, as the district court pointed out, issuance of *White I* in August 1980, would not have held up Baird's fees claim had Baird proceeded with reasonable dispatch during the preceding period, since, had he done so, the fee issue would have been

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[2] While prejudice to the party from whom fees are sought is of primary significance, prejudice to the judiciary is also materail. Courts today are seriously congested. It is unfair to other litigants if memories diminished by unfounded delay cause longer fees proceedings. This point is related to that made by the district court when it spoke of the harm caused by interruption of the "continuum." *See* note 1, *supra*.

heard and resolved before August 1980. Baird first learned of his victory when the Supreme Court's decision came down on July 2, 1979. He could have started putting together a fee motion immediately thereafter. Especially in light of this, the district court felt that it was reasonable to have expected him to move for a fee within 60 days after the October 1, 1979, denial of rehearing. Had he done so—indeed, had he moved within even twice or treble that time[3]—his motion would have been heard and doubtless decided before our decision in *White I* came down. We think, therefore, that the further delay, and any prejudice therefrom, resulting from *White I* can be laid at Baird's own doorstep.

Second, even if we were to count against Baird only the delay from October 1, 1979 until August 1980, when *White I* came down, the consequences were sufficiently prejudicial to justify denial of fees in a matter of this complexity. Cole left the Attorney General's office in August of 1980; thus prejudice due to his absence was complete by the end of the ten months. Some prejudice can also be inferred from the normal erosion of memories over the ten-month period. In Baird's case, unlike PPLM's, the services to be evaluated went back to 1974 and they included both trial and appellate activities. Baird, moreover, had switched counsel in midstream, requiring inquiry into whether work done by new counsel needlessly duplicated that of old counsel. *See King* v. *Greenblatt*, 560 F.2d 1024 (1st

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[3] In determining what time was reasonable, the district court took note of our *White II* decision, 679 F.2d 283 (1982), in which we held that a four-and-one-half month delay, although "considerable," was not so extreme that the court abused its discretion in accepting it. The court below commented, "[i]f, even with special circumstances, four and a half months is 'considerable,' how much more are the delays here, if there were none." 555 F. Supp. at 582.

In *White II*, of course, we began with a district court's prio determination that four-and-one-half months was acceptable in the circumstances. Section 1988 confers primary discretion upon the district court, not this court. The question is not what we ourselves would do but whether the district court acted unreasonably. Here we begin with a district court's determination that a period far longer than four-and-one-half months was *unacceptable*.

Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). While the defendant's and the court's task of reconstruction would have been hard enough had a timely motion been filed, a delay of this order plainly added to their difficulties.

We therefore hold that the district court was within its discretion in finding that the prejudicial elements with respect to Baird's fee request created "a strong probability of prejudice." The factors it enumerated, when coupled with the extraordinary, unjustified length of the delay,[4] constitute a level of actual prejudice sufficient to meet the Supreme Court's standard for the denial of attorneys' fees under 42 U.S.C. § 1988. *White*, 455 U.S. 445, 454 (1981). Bearing in mind that the district court, not ourselves, retains primary discretion in these matters, we see no basis to reverse its denial of fees to Baird.

b. PPLM

PPLM's lesser eight-month delay was also, as we have said, unreasonable. Additionally, it was unjustified—counsel was simply too busy to be bothered.

However, we do not agree with the district court that PPLM's delay was shown to have been prejudicial. We distinguish between Baird and PPLM primarily because the work for which PPLM's attorneys sought compensation is so much more easily appraisable. We are not persuaded that the eight months that went by made it significantly more difficult for the district court to appraise, or the defendant to challenge, the services said to have been performed. The services in Baird

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[4] The 30 months in Baird's case comes close to a delay so long that courts might infer prejudice simply from its length, without more. (Baird's 30-month delay was nearly four times longer than PPLM's.) *See* note 1, *supra*. *Compare* McClintock, *Equity* § 29 (2d ed. 1948) (absent prejudice, a long delay does not amount to laches) *with* Walsh, *Equity* § 31 (1954) (no hard and fast rules as to what amounts to laches); *see generally* Re, *Remedies* at 527 & n.59 (1982). We need not, however, decide this point as there was adequate extrinsic indication of actual prejudice.

related to a number of complex trail and appellate proceedings over a five-year period, but PPLM's work consisted of arguing and briefing a single case in the Supreme Court, namely *Bellotti* v. *Baird*, 443 U.S. 622 (1979), argued in February 1979.[5] The district court's own memory of counsel's performance is not involved.

While recognizing this, the district court felt that the passage of time had created prejudice—at least to the extent that a longer fees hearing might be required. With all respect, we think there is insufficient support for such an inference.

The district court mentioned a number of facts from which it derived prejudice: First, the number of hours claimed, 880, is so great as to be "entirely foreign to the court's experience." 555 F. Supp. at 598. This means, it said, that "unusual scrutiny" is called for, a requirement which the passage of time makes more onerous. *Id.* Second, and related, is the issue of possibility unnecessary duplication within counsel's law firm, i.e., the affidavit lists four people spending 80 or more hours apiece, and 118 apparently interoffice conferences. Third, the court questioned whether much of the brief and argument had not already been foreshadowed in prior lower court opinions—to the point that much of counsel's time charges reflected a mere gilding of the lily. "[A]t some point, fairness and diminishing returns dictate that charges be not further run up against an opponent." Finally, the court noted that Garrick Cole had left the Attorney General's office in the summer of 1980. Had the fees request been filed within two or four months from October 1, 1979, Cole would have been fully available and, of course, the matter would have been wrapped up before our decision in *White I*, which came down in August 1980 (with the

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[5] The district court described the work as follows:

> Not only were the services relatively more recent, but they were confined to resisting defendant's second appeal, viz., a motion and brief to affirm, a principal brief, obtaining leave to argue orally, and appellate argument, and were thus of a type simpler, and more easily appraisable, than Baird's totality.

practical effect of putting fees matters on ice until the Supreme Court reviewed the question).

Although we regard some of the above factors as prejudicial with respect to Baird's claim, which related to multiple proceedings over five years, we find their prejudicial effect on PPLM's to be far less obvious. We do not see how the passage of time could much affect the court's ability to determine whether counsel's work was duplicative or unnecessary. For example, comparison of counsel's Supreme Court brief with the prior opinions of the three-judge district court would suffice to indicate how much duplication was involved there. To be sure, Cole's presence will help the defendant, but Cole is practicing with a Boston firm, and for a one-shot matter like this, as contrasted with Baird's five-year litany, he seems sufficiently available. While the passage of time will have blunted the district court's recollection, it is hard to see how recollection has much bearing in deciding whether the brief and arguments in the Supreme Court were worth 880 hours or only one-third of that. Even by the fall of 1979, the court had been away from the case for over a year. Moreover, in the unlikely event an item should arise as to which forgetfulness or absent witnesses due to elay are a real factor, the court's discretion under section 1988 is broad enough to permit it to disallow the item without prolonged inquiry.

In sum, given a fee claim where the basic issue is to evaluate services relative to a single appellate brief and argument, we are unable to see that PPLM's delay, albeit excessive, caused sufficient prejudice to deny any fee at all. We therefore vacate the court's denial of PPLM's fees request, and remand to the district court with directions that it establish the amount of, and award, that fee. We repeat that the court's discretion on remand includes the right to reduce the fee by whatever amount, if any, it finds proper to protect the defendant (or the court itself) against possible adverse consequences attributable to plaintiff's original unreasonable delay should the court, on remand, actually identify such.

It might be questioned why Baird's fees request should not be similarly treated. The answer to this, as already indicated, is that material prejudice was shown in his case, based on the length and complexity of the services to be evaluated. When unreasonable delay is coupled with a demonstrated likelihood of actual prejudice, the district court is fully warranted in denying a fee altogether. *See White*, 455 U.S. at 454.

The time and effort expended by two courts on this matter leads us to repeat our earlier suggestion made in *White II*, 679 F.2d at 285, that the district courts in this circuit adopt a local rule, as approved by the Supreme Court in *White*, 455 U.S. at 454, fixing a definite time within which fees requests must be filed. A rule will prevent recurrence of cases of this nature.[6]

We affirm as to Baird's fees request, and vacate and remand as to PPLM's.

So ordered.

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[6] In *White II* we recommended adoption of a local rule requiring a fee request to be filed within 21 days after judgment. Twenty-one days was the period mentioned in an Eighty Circuit decision cited by the Supreme Court in *White*.

Upon rethinking, we are now inclined to recommend that a local rule contain a longer period, such as 45 or 60 days. This longer period will give all parties time to learn whether an appeal has been filed—and, if so, to move to extend the period for requesting a fee until some specified time after the appeal is resolved. The difficulty most often mentioned in a hard-and-fast local rule is that the party who prevails in the district court may not continue to prevail on appeal, thus losing entitlement to a fee. This problem can be met in various ways, one of which would be to draft the rule to provide that a fee request must be filed within 45 or 60 days folowing entry of judgment *unless*, upon motion filed within such period, the court for good cause shown extends the time for filing the fee request. (If post-judgment motions are filed, the local rule might also want to defer the running of the 45 or 60 days until the motions are decided, *see* Fed. R. App. P. 4(a)(4).)

Where a local rule is promulgated, this court will strongly support an insistence upon its strict observance.

APPENDIX B

William BAIRD, Mary Moe, Gerald Zupnick, M.D., Parents' Aid Society, Inc. et al., Plaintiffs,

v.

Francis X. BELLOTTI, Attorney General, et al., Defendants.

Jane Hunerwadel et al., Defendants-Intervenors.

Civ. A. No. 74-4992-A.

United States District Court,
D. Massachusetts.

Dec. 13, 1982.

OPINION

BAILEY ALDRICH, Senior Circuit Judge.*

The single matter dealth with in this opinion is defendants' motion to dismiss for lateness plaintiff-intervenors' and plaintiffs' applications for attorney's fees under 42 U.S.C. § 1988, filed 8, and 30 months, respectively, after the Supreme Court had denied a petition to rehear its decision affirming this court's judgment in their favor. Counsels' services were rendered in litigation brought to declare unconstitutional a Massachusetts statute which required a minor to obtain parental, or judicial, consent to an abortion. Original plaintiffs were William Baird, his non-profit abortion and counseling clinic, Parents Aid Society, Inc., Mary More, an unmarried minor several weeks pregnant, as an alleged class representative, and Gerald Zupnick, a physician who performed abortions professionally. Prior to defendants' second, and final, appeal, to the Supreme Court, Planned Parenthood League of Massachusetts (PPLM) and certain others were permitted to intervene as parties plaintiff. Defendants were the Massachusetts Attorney General and other appropriate state officials. For convenience, original plaintiffs will be referred to as Baird, in-

tervenors as PPLM, and all, jointly, as plaintiffs. Defendants will be referred to simply as defendant.

I *Background*

The action was commenced as a three-judge district court matter under 28 U.S.C. §§ 2281 & 2284 in October, 1974. It resulted in six published opinions, the last of which, *Bellotti* v. *Baird*, 1979, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797, was decided on July 2, with rehearing denied October 1, 1979.[1] Nothing occurred thereafter until May 29, 1980, when PPLM filed a motion for attorney's fees, together with a supporting affidavit detailing their services, a brief memorandum of law to aid in their appraisal, seven pages of abstracts of First Circuit and other circuit fees cases believed pertinent, and computer printouts detailing the individual items of work performed. These documents were sent to the deputy clerk in Springfield, Massachusetts where Judge Freedman, the district judge originally drawn, was then permanently stationed.

Defendant filed no response, probably through oversight, perhaps due to too many assistants, who, by that time, had moved on to other matters. Alternatively, it is possible he was waiting for Baird wrote Judge Freedman the following letter.

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[1] The earlier five were *Baird* v. *Belotti*, D.Mass., 1975, 393 F.Supp. 847; *Bellotti* v. *Baird*, 1976, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844p *Baird* v. *Bellotti*, D.Mass., 1977, 482 F.Supp. 854; *Baird* v. *Attorney General*, 1977, 371 Mass. 741, 360 N.E.2d 288; and *Baird* v. *Bellotti*, D. Mass., 1978, 450 F.Supp. 997. Except for a temporary set-back due to a newly-found desire by the Attorney General for abstention, coupled with representations by him about the Massachusetts statute—which proved incorrect—plaintiffs were uniformly successful.

[2] Balliro replaced Lucas in April, 1977, just prior to the hearing in this court that led to the ruling in plaintiffs' favor affirmed by the Second Supreme Court decision.

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JOAN C. SCHMIDT
MARK G. MILIOTIS

June 17, 1980

John C. Stuckenbruck,
Deputy Clerk
United States District Court
436 Dwight Street
Springfield, MA 01103

Re: William Baird, et al. v. Francis X. Bellotti, et al.

Civil Action 74-4992-F

Dear Mr. Stuckenbruck:

Kindly inform the Court that plaintiff's counsel are in the process of preparing their Motion for Attorney's Fees and Costs in above entitled matter. We anticipate filing our motion, accompanying affidavit and memorandum of law in approximately two to three weeks.

Very truly yours,
/s/ Joan C. Schmidt
Joan C. Schmidt

JCS/dpi

cc: Gerrick F. Cole, Esq.
Assistant Attorney General
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40 Court Street
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Boston, MA 02109

This undertaking was not complied with. Nothing further occurred until April 12, 1982, when counsel for PPLM wrote Judge Freedman requesting that its motion be heard, staging that he had not made the request earlier because of the Pendency of *White* v. *New Hampshire Department of Employment Security*, post, now decided. Three days later counsel for Baird served in hand, and on April 20, filed a motion for attorney's fees supported by extensive affidavits and memorandum of law.

[I] At this point Judge Freedman requested the writer of this opinion to substitute for him as principal district judge. This request was accepted. The court now rules that all matters following the Supreme Court's second decision aresingle judge matters, and, accordingly, proceeds alone to decide the motion to dismiss. *See Rosado* v. *Wyman*, 1970, 397 U.S. 397, 400, 90 S.Ct. 1207, 1211, 25 L.Ed.2d 442; *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 1941, 312 U.S. 621, 625, 61 S.Ct. 784, 786, 85 L.Ed. 1083; *Mader* v. *Crowell*, M.D.Tenn., 1981, 506 F.Supp. 484, 485-86.

II *Motion to Dismiss*

On April 29, 1982, defendant filed a notice of opposition to Baird's motion and a motion to dismiss PPLM's motion. By an amplified consolidated motion, filed on May 20, defendent moved to dismiss all motions, giving the following reasons.

"1. Plaintiff's application for attorney's fees, which was filed almost four years after this Court's final judgment in this case, is untimely or, alternatively, barred by laches.

"2. Plaintiff-intervernors' application for attorney's fees, which was filed almost one year after the final decision of the United States Supreme Court and supplemented almost three years after that decision is untimely or, alternatively, barred by laches.

"3. Plaintiff-intervenors' application for attorney's fees should be dismissed for lack of prosecution, since plaintiff-intervenors took no action on that motion for almost two years after it was filed."

A. *Lack of Prosecution*

[2, 3] PPLM's counsel has filed an affidavit, which the court accepts, stating that counsel was initially reluctant to press the court in the summer of 1980 with a motion which presented substantial material. By the same token, the court notes that since the court and the several lawyers are unlikely to synchronize their summer vacations, by waiting until May 29, 1980, PPLM was almost necessarily precluding a hearing, and perhaps any other meaningful activity, until fall, thereby approaching a full year even from the denial of rehearing. Meanwhile, on August 12, 1980, the Court of Appeals decided the case of *White* v. *New Hampshire Department of Employment Security*, 1 Cir., 1980, 629 F.2d 697 (*White* I), holding that attorney's fees must be applied for within 10 days of final judgment, pursuant to F.R.Civ.P. 59(e). While pondering this imposing obstacle PPLM's counsel stated he learned that certiorari had been applied for, and, later, granted, and so concluded to wait. Six weeks after the Court reversed the Court of Appeals, *White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982) (*White* II), PPLM requested that its application be heard.

The court finds PPLM's delay in marking, as distinguished from filing, reasonable under the circumstances. Likewise, the court does not charge defendnat with failure to file his motion to dismiss sooner. PPLM has suffered no prejudice, and defendant's motion was prompt as to Baird.

B. *Timeliness*

With respect to defendant's claims that plaintiffs' applications were "untimely or, alternatively, barred by laches," there is no issue of timeliness in the strict calendar sense, the Court having ruled in *White* II that there was no applicable rule with a time provision. The Court did not decide whether the matter came under F.R.Civ.P. 54(d) and 58, which set no time, or under no rule at all and was purely equitable. In either event, however, there are serious questions of timeliness in the broader sense.

In *White*, plaintiff's counsel, five days after a consent judgment, raised the matter of fees with defendant's counsel, and sought, unsuccessfully, to confer on the amount. Four and a half months later White filed his application. Defendant responded that the issue was disposed of by the consent decree. The court ruled otherwise, and proceeded to award a fee. Defendant appealed, claiming, inter alia, that the fee application was untimely in light of Rule 59(e). The Court of Appeals agreed, *White* I, but was reversed by *White* II, the Court remanding the case for further consideration.

In *White* II the Court, describing a fee award as costs in the sense of available only if the party prevails, but "collateral" and "separable" and not within Rule 59(e) and its ten day requirement, stated that the imquiry should be whether delay "unfairly surprises or prejudices the affected party." It added that negotiation before filing is desirable, but that there are advantages to promptness, and a local rule, such as 21 days from final judgment, could be appropriate. It found it unnecessary to decide whether fees are costs under Rule 54(d) and 58, but noted that, in any event, the district court has discretion to deny motions filed with "unreasonable tardiness."

On remand, *White* v. *New Hampshire Department of Employment Security*, 1 Cir., 1982, 679 F.2d 283 (*White* III), the court analyzed the district court's decision and concluded that it had in effect found that there had been no unfair surprise or

prejudice. It did not, however, stop there, but considered whether the court's decision was reasonable.

> "[T]here was no applicable local rule in force. In its absence, the determination of timeliness rested within the sound discretion of the district court. The delay here—approximately four and one-half months after the entry of the consent decree—was considerable, but it was not so extreme, given all the other circumstances of this case, as to necessitate a finding that the request was untimely, and the district court did not make one. *See* 629 F.2d at 701. Although well aware of the time involved, the district court plainly did not consider the motion as having been delayed unreasonably. Finding no abuse of discretion with this determination, we proceed to NDHES's other challenges to the award." *White* III, at 285.

Of particular significance is the phrase, "not so extreme, given all the other circumstances." There were two; that fees were discussed prior to the entry of judgment, and that plaintiff's demand was brought to defendant's attention five days after judgment was entered. If, even with special circumstances, four and a half months is "considerable," how much more are the delays here, if there were none. In this last, the plaintiffs may not stand alike.

(a) *Baird's Claim.*

As previously noted, Balliro and Schmidt closely followed PPLM's filing with their June 17 letter stating that Baird would file shortly. Since section 1988 makes the party, not individua counsel, the one entiltled, this letter must be taken as speaking also for the services of former counsel, Roy Lucas, of Washington, D.C.[2] Although the court pointed to this undertaking at the hearing on the present motion, it has never been informed why it was not carried out.[3] Balliro and Schmidt

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[3] Baird was the only one who requested an oral hearing. Immediately before the assigned date, he withdrew the request. The court concluded to

executed affidavits, containing their diary entries, on August 11, 1980,[4] but failed to file them until April 20, 1982, when Lucas filed his. Accompanying the affidavits was an extensive memorandum, signed by all three attorneys, but manifestly prepared by Lucas. All threee Baird attorneys also signed the memorandum opposing the motion to dismiss, although, again, it appears to have been written by Lucas. What is stated hereafter is taken therefrom.

Baird, unlike PPLM, post, makes no claim that the delay in filing his motion for fees was due to counsels' other preoccupations: rather, it was due to the state of the law. After saying he did not become a prevailing party until October 25, 1979, Baird says,

"The principal guide at that time came from the Supreme Court decision of *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 [59 S.Ct. 777, 83 L.Ed. 1184] (1939)."

Sprague is, indeed, a guide a guide in one respect. Defendant, quire unaccountably, argues the desirability of filing for attorney's fees immediately after the district court's judgment

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hold the hearing nevertheless, and counsel appeared and argued. Thereafter the court inquired of all counsel hether they had done any substantial other work not entered in their diaries. Nothing was vouchsafed by Baird.

[4] Balliro's affidavit terminates,

July 2, 1979	Review of opinion from U.S. Supreme Court, conference with clients.	2.0 [hrs.]

Schmidt's terminates,

July 2, 1979	Review of opinion from U.S. Supreme Court; conference with Mr. Balliro and clients.	2.0 [hrs.]
July 1, 1980 through August 1, 1980	Preparation of bill	15.0 [hrs.]

on the merits, so that any appeal from the court's action may be consolidated with the substantive appeal. *Sprague* may well be taken as opposed to that view — as is this court, in the present case.[5] However, it in no way suggests delay after the initial judgment had become final, the basic issue at bar. In *Sprague* the fee application was filed two months *before* the Supreme Court's affirmance of the judgment. *See* 307 U.S., at 163, 59 S.Ct. at 778. *See, also,* the decision below, cited by the Court, *Sprague* v. *Picher,* D.Me., 1938 23 F.Supp. 59.

Next, Baird says that in October, 1979 there were questions of law pending before the Supreme Court which, if decided against him, could make his pursuit of fees fruitless.

"In addition [to *Sprague*], several important and potentially illuminating cases were already before the Supreme Court.

"On October 1, 1979, the Court granted certiorari in *Maher* v. *Gagne [Gagne* v. *Maher],* 5954 F.2d 336 (2d Cir.1979). 444 U.S. 824 [100 S.Ct. 44, 62 L.Ed.2d 30]. The next week the Court agreed to hear. . . .

"These five cases, individually and collectively, had overwhelming significance for the *Baird* fee issue, Adverse rulings on some issues could have eliminated the claim entirety. Favorable decisions and a strong reinforcement of Congressional purpose could strengthen and simplify the Baird disposition.

"By waiting, plaintiff's counsel were conserving the time of this Court, not violating any local rules, and exercising reasonable legal judgment. It would have been precipitous, if not irresponsible, to charge ahead, inviting unnecessary disputes, appeals, and a waste of judicial time."

A reiew of these cases, as confirmed by the ultimate decisions, discloses no guidance that could have been expected,

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[5] Defandant's contrary argument is premised on the assertion that this court's 1975 decision was a "final judgment." Of course it was not.

with the most minor exceptions. It is to be borne in mind that the Court had already held, in *Hutto* v. *Finney*, 1978, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522, that the Eleventh Amendment was no bar to an award of counsel fees. The issues in Baird's five cases did not threaten this holding, and in no way indicated that it would be "precipitous, if not irresponsible, to charge ahead" nd file for fees. Rather, to have been deterred by their "potentiality" would seem a counsel of catatonic arrest.[6]

Nor does it appear that these cases in fact motivated Baird at the time. There are no diary entries in October, 1979; the first entry with respect to Baird's seeking fees is on March 6, 1980. "Confer w/client & co-counsel in Boston on possibility of § 1988 fee recovery in light of pending cases & recent legal research. (RL) 2.0" The next is "3/80 Legal research by paralegal CI on CA 1 fee cases & others relevant to a Baird counsel claim. (CI) 16.5." If it be thought that counsel had general knowledge of the five October cases and was awaiting their resolution to avoid wasting time, nothing had occurred in March. It is true that they received mention on 6/26/80, after the end of term,

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[6] *Gagne* v. *Maher*, 2 Cir., 1979, 594 F.2d 336, *aff'd* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653, involved plaintiffs' right to fees incurred in the fee proceeding itself—already decided in favor of plaintiff in *Lund* v. *Affleck*, 1 Cir., 1978, 587 F.2d 75, 77. A decision here would be ultimately relevant, but not to the motion itself. *Carey* v. *New York Gaslight Clug, Inc.*, 2 Cir., 1979, 598 F.2d 1253, *aff'd*, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723, could, perhaps, have been cited in defeating defendant's contention that fees were not recoverable in connection with the certification proceeding in the Massachusetts court held at the Supreme Court's direction, a claim we could only label preposterous to begin with. The issues in the other three cases, *Consumers Union of the United States, Inc.* v. *American Bar Association*, E.D.Va., 1979, 470 F.Supp. 1055, *vacated and remanded, sub nom. Supreme Court* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641; *Thiboutot* v. *Maine*, Me., 1979, 405 A.2d 230, *affd* 448 U.S. 1, 100 S.Ct. 2502, 65 O.Ed.2d 555; and *Mahoning Women's Center* v. *Hunter*, 6 Cir., 1979, 610 f.2d 456, *vacated and remanded*, 447 U.S. 918, 100 S.Ct. 3006, 65 L.Ed.2d 1110, are not even remotely related.

"Study impact of *N.Y. Gaslight* (6/9), *Va. Consumers* (6/2), *Maher* v. *Gagne* (6/25), *Thiboutot* (6/25), and *Mahoning* (6/16), on possibility of fees in case. (RL) *4.0*"

but, in view of Lucas' thoroughness in spending over 200 hours on the fee issue, the court attaches no special significance to this. If, in fact, he was delaying for their decision, action should have then ensued. It did not; the next entry was August 12. "Review fee matter, confer w/JH re: research. (RL) .25"

It was also on August 12 that *White* I was decided. One may doubt, however, that non-parties had instantaneous notification thereof. The first reference to be found in any diary entry,—"Research *New Hampshire* case"—comes a month later. Moreover, we note this singular situation. If the pending october cases justified delay in preparing the fee application because "almost any result . . . would preempt the legal research work product of October 1979 through June 1980 to some extent," *White's* ruling that it was already too late, which did not stand alone in the circuits and might well be affirmed, would seem to have been far more threatening than they. Yet, although "ever" concerned that "hundreds of necessary hours would be wasted," in the time between study of the *New Hampshire* case and the advent of *White* II, the Lucas office spent almost one half of its entire fee preparation time. To answer this seeming inconsistency by writing off that activity as "some minimal work"[7] is shocking. On this total record the court gives no greater weight to the assertion that the state of the law in October, 1979 was Baird's reason for not proceeding at that time. The reason was simply personal choice, now tarted up.

(b) *PPLM's Claim.*

PPLM did not rely on the state of the law, and filed on May 29, incidentally before any of the October, 1979 cases had been

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[7] "Plaintiffs' counsel continued some minimal work through associates in the hope that *White* would not stand." Baird Memorandum, at 4.

decided. Its excuse was that counsel was otherwise occupied.[8] A good deal of documentation would be needed for so long a period, and none was offered. Nor does the court accept PPLM's assertion, "As a delay of four and a half months in *White* was acceptable . . ., [t]he extra two and a half months is insignificant. . . ." This is a method of arguing that knows no limits. Moreover, although seven months from receipt of mandate on October 25, where PPLM's proffered excuse for delay is other demands on counsel there could have been no doubts after October 1, the date of the denial of the petition. It is inconceivable that there could have been a second. Indeed, where the Court had decided 8 to 1, one might ask what doubts could have been occasioned by the first. PPLM's seven months had one month's certain advance notification, and three more, close to certain. Quite apart from White's special circumstances, this is far different from White's four and a half months.

(c) *Timliness-Conclusion.*

The court does not consider there to have been need for PPLM to consume seven months in any event. It could have required little legal skill to tabulate book charges, and there was nothing about its affidavit and short memorandum and assembly of cases that required particular expert specialization. Abstracting cases on attorney's fees would seem a pedestrian undertaking.[9]

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[8] It also spoke of a computer printout problem, but we cannot think of this in terms of months.

[9] The court does not know how much time was, in fact, spent on this matter, PPLM's counsel stating that he charged "extensive research" to another case. Although attorney's fees as costs are collected in U.S. Code Annotated and in West Digest, the court will assume that, in yours, this could be considerable. On this single, straightforward subject, however, it does not assume that it required a matter of weeks, occupying fall and winter. So far as legal work directed to this case is concerned, it did not begin until April 10, 1980 and required to May 29, the date of filing, 18 hours.

Baird filed much more than this, a memorandum fifty pages long, in addition to eight pages of abstracts. However, if a party wishes to do a job in spades (Lucas spent 215 hours on his fees, as distinguished from 185 hours on the first Supreme Court appeal) this should not be at the expense in terms of time—or dollars—of the party on whom the burden falls.

The court agrees that plaintiffs were not obliged to borrow a lear from *Sprague's* book and file prior to the denial of the petition for rehearing. However, particularly with lead time to indicate probabilities of being able to file, it sees no reason for more than a sixty day delay thereafter. This appears to be normal practice in other fee cases. *See, e.g., Johnson* v. *Snyder*, 6 Cir., 1981, 639 F.2d 316 (per curiam); *Jones* v. *Dealers Tractor & Equipment Co.*, 5 Cir., 1981, 634 F.2d 180, 181 (per curiam). *But see Gary* v. *Spires*, 4 Cir., 1980, 634 F.2d 772. Even if the two months were to be doubled, PPLM fell well short. Baird was not even in sight.

C. *Prejudice*

(a) *The Length of the Delay*

Particularly where a claim of prejudice is based upon delay simpliciter, therre must be two inquiries, how long was the delay, and what was its effect? The starting point, when there comes to be "unreasonable tardiness" (*White* II n. 17), has already been considered. There are questions as to the other end. With respect to Baird defendant claims the full period to April 20, 1982, namely, some two and a half years. Baird says the interval between *White* I and *White* II should be deducted. The court disagrees. In the first place, Baird was nowhere near ready to proceed on August 12; there is nothing to indicate that he would have filed for months. Moreover, there is a deeper principle. The concept of laches is that a party is to be forgiven his unreasonable delay, provided it has had no prejudicial consequences. If there are such, it is irrelevant how they occurred, or whether it was his fault. If a vital witness dies, that is plaintiff's misfortune; if he remains fresh and available, that is plaintiff's good fortune. The test of prejudice vel non is

simple and objective, was defendant hurt as a result of the delay?

Because of Baird's non-filing, and the arrival of *White* I, all proceedings obviously came to a halt, as a direct consequence. Baird is not to be credited, but to be debited for this delay, to the extent that it hurt, and defendant's prejudice must be measured by the entire interval.

PPLM is in the same difficulty. If a defendant's witness had died a week after a late suit was filed, and before it could possibly have been trid, (or, conceivably, before his deposition could have been ttaken, a remedy not available here), the loss should be just as much a consequence of the late filing as if the witness had died the week preceding. *White* I's appearance interrupted the present proceedings just as much as if it had occurred three months earlier. The court could hardly be expected to have a hearing between June 1 and August 12; PPLM's counsel suggested as much in stating why he did not request a summer hearing. Accordingly, *White* I's interruption was a direct consequence of PPLM's late filing, and PPLM must be charged therewith. In sum, neither plaintiff was rescued by *White* I; rather, they were further submerged.

Concededly this was hard lines. However, where their fault was established, the only question was the practical result, which was that the court was not presented with an opportunity for a hearing until two and a half years had elapsed from the clerk's office's receipt of mandate.

This conclusion may be tested by approaching from the other direction. If application had been made promptly in the fall or early winter, it could have been disposed of well before *White* I's arrival. Baird has suggested that possibly this might not have occurred. However, the party at fault is not the one to engage in speculations.

(b) *The Effect of the Delay*

When delaying a matter that, although separate, is collateral to and closely connected with, judicial proceedings that have

otherwise terminated, prejudice should arise quickly. The advantages of a continuum, and the loss from interruption, differ from laches in the bringing of a cause of action. In *White* II the Court spoke favorably of a 21 day rule, a recognition of the desirability of promptness. This benefits everyone—except possibly plaintiffs. The financially responsible party has a natural interest in clearing up its docket and getting things behind it. So has the court. While the *White* Court did not speak of the court as an affected party, it manifestly is. The question did not arise in *White* because the district court there had made an award, and had indicated no objection to delay. A court may well be affected, however, both for itself and on behalf of the defendant.

A Massachusetts plaintiff seeking fees presently comes into court with diaries and records and asserts a "lodestar" fiture. *Furtado* v. *Bishop*, 1 Cir., 1980, 635 f.2d 915. Wherever may be the burden of proof, the burden of going forward with the second step, viz., establishing excessiveness, or countervailing, or negative aspects, would normally seem to be on the defendant. The court has been held obligated to state reasons for a departure, a view already current in October, 1979. *See Gagne* v. *Maher*, 2 Cir., 1979, 594 F.2d 336, 345, *aff'd* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653, and cases cited. While, in October, 1979 the First Circuit had not yet adopted the "lodestar" approach, plaintiffs were on notice that the court called for very specific analysis and findings. *Furtado* v. *Bishop*, 1 Cir., 7/26/79, 604 F.2d 80, 98, *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672, a case reversing the present writer for failure to do so. Either method imposes a heavy factual burden on someone, which can only increase with the passage of time.

Baird would meet this last conclusion by inquiring, with respect to defendant's right to be heard, whether assistant attorneys general suffer from "amnesia." His proferred reply to defendant's pointing out that there is a normal turnover in the Attorney General's office and that, during the delay, his last knowledgeable assistant had, indeed, left, very possibly

diminishing the interest, and perhaps availability, of departed employees with respect to affording sufficient time for reviewing files and refreshing recollections, is that if departures could be recognized, "there would be massive layoffs each time a major case was lost." Filing his application nearly three years after the Court's final opinion, five years after Lucas had performed any services, the court would not think him in a position to adopt this style of argument. Nor is defendant's point ill-taken. Courts have found prejudice simply in the fact that employees have left their employment. *Goodman* v. *McDonnell Douglas Corp.*, 8 Cir., 1979, 606 F.2d 800, 808 ("retired, transferred [or] quit"), *cert. denied*, 446 u.s. 913, 100 S.Ct. 1844, 64 L.Ed.2d 267; *Boone* v. *Mechanical Specialties Co.*, 9 Cir., 1979, 609 F.2d 956, 959 ("retirements, voluntary and involuntary terminations").

Baird then engages in a switch.

> "Nor is the testimony of prior assistants necessarily relevant. Their tasks as defendant-appellants for the most part were different. It is the Court's duty, in the long run, to decide what work was reasonable and what fees are just. No overriding issue in this fee matter turns upon the recollection of past assistant attorneys general. One does not write a history of an event from the recollection of those who departed the scene and left their records and/or memories behind."

Apparently the departed assistants are good riddance.

While the court regards a defendant's right of participation in argument, and possibly testimony and cross-examination, as important, it accepts Baird's assertion that itself is perhaps the most important factor. A judge's qualifications to determine appropriate and reasonable consel fees come in large measure from his closeness to, and familiarity with, the case. While this relates particularly to proceedings that took place before him, it also applies to subsequent proceedings originating therefrom. At the same time, a judge, who must constantly move from one case to another, can forget. It requires additional effort and time to recall the past. Unnecessary taking of the

court's time is an imposition on other litigants. In this connection the Court of Appeals has recently held that "inconvenience . . . to the court [and] to other litigants" may be a reason for not permitting even a short reopening of a trial. *Blaikie* v. *Callahan*, 1 Cir., 1982, 691 F.2d 64, 67. *See also*, discussion and cases cited in *Affanato* v. *Merrill Brothers*, 1 Cir., 1977, 547 F.2d 138, 140. While the court recognized in *Affanato* that the outright loss of rights was a serious matter, as does this court, it is to be recalled that the right to counsel fees is tempered by the court's discretion. It is a familiar principle that he who seeks equity should do equity. Nevertheless, while the court feels that prejudice to parties other than defendant should be encompassed in this overall question and charged against plaintiffs, for the purposes of its actual resolution of prejudice vel non it will consider only prejudice to the defendant. If a court above would also consider prejudice to the court and to other litigants, the court feels that such would result here if plaintiffs' lateness were to be overlooked.

Not only can the court forget tempoerarily, it may well not be possible to refresh its recollection completely. This disability may substantially affect the defendant. If the court fails to remember events or circumstances rebutting or diminishing any of plaintiffs' claims, which they assert to be prima facie until discounted, it will be at defendant's cost.[10] It seems more than possible that testimony may have to be taken; certainly more than generalized argument will be in order. The passage of time may well dull the memory even of plaintiffs' various counsel as to why certain of their activity, or the extent thereof, was deemed necessary. This, too, under the circumstances, is more likely to redound to defendant's loss than to plaintiffs'.

So far the court has been looking at the situation from the standpoint of the defendant, and of the court in the broad

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[10] As an important example, the court's memory could grow dim, as it now has, with respect to the basis of its "reservations about the adequacy of plaintiffs' [viz., Baird's] representation." *See Baird* v. *Bellotti*, 450 F.Supp., at 999 n. 3.

sense. It should ask itself, in turn, whether, in remedying unfairness to defendant by denying fee claims, it is being unfair to plaintiffs. Plaintiffs can say that in October 1979 the fee statute was only three years old and there had been no cases telling them they should proceed other than at their own pace.[11] On the other hand, there was no case telling them they could do so. The very fact that the statute describes attorney's fees as costs indicates an obvious attachment to the principal cause of action. Mos important, their equitable nature is made clear by the fact that the fee award is discretionary. The reasons for promptness here advanced were not dredged from recess of imagination. Rather, as a matter of fairness, they would seem as self-evident in 1979 as now. Evey today plaintiff's, and the court's, research has been unable to find cases considering the question more favorable to them than *White* III.[12]

III *Conclusion*

The delay with respect to Baird is particularly serious, even if it were to be assumed that *White* I had never been decided and Baird's filing date be taken, on the basis previously discussed, as the fall of 1980. A great length of time had already

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[11] *White* I already had a predecessor invoking Rule 59(e). *Hirschkop* v. *Snead*, E.D.Va., (8/2/79), 475 F.Supp. 59, *aff'd*, 646 F.2d 149.

[12] The "over four month" delay in *Brown* v. *City of Palmetto*, 11 Cir., 1982, 681 F.2d 1325, is certainly no more favorable than *White* III. *Bond* v. *Stanton*, 7 Cir., 1980, 630 F.2d 1231, *cert. denied sub nom. Blinzinger* v. *Bond*, 454 U.S. 1063, 102 S.Ct. 614, 70 L.Ed.2d 601, and *Doulin* v. *White*, E.D.Ark., 1982, 549 F.Supp. 152, are distinguishable since in both post-judgment fee settlement negotiations had occurred. This court is aware of Judge Freedman's decision in *Brewster* v. *Dukakis*, D.Mass., 1982, 544 F.Supp. 1069, where the court allowed a fee application filed two years late. However, the court found no significant prejudice, noting that the prties had continued a close negotiating and monitoring relationship since judgment based on a consent decree. Since the case involved complex litigation relating to hospital services and the award was deemed interim to continuing jurisdiction by the court over the parties for purposes of enforcement, the case is distinguishable on the facts. To the extent that it is not, this court declines to follow it.

passed as to some of the services—all that were rendered by Lucas—and delay may have a crescendo effect. Also, there were many services, and they were diverse. On any basis, *White* or no *White*, the court would find a strong probability of prejudice.

PPLM's filing was very much prompter, though even here, for reasons previously noted, there would seem little practical difference between May 29, and a filing the following fall. PPLM has further differences. Not only were the services relatively more recent, but they were confined to resisting defendant's second appeal, viz., a motion and brief to affirm, a principal brief, obtaining leave to argue orally, and appellate argument, and were thus of a type simpler, and more easily appraisable, than Baird's totality. However, PPLM has presented the court with a serious problem. These services consumed a total of 880 hours, for which is requested $65,000, plus a 50% multiplier. This number of hours for such activity, even for a single appellee,[13] is entirely foreign to the court's experience. It would seem especially large with respect to a case that had already been extensively briefed, and as to which, with due modesty, there had been a considered opinion. Moreover, PPLM was an appellee in a relatively comfortable position.[14] "The [Massachusett] court did not . . . read into the statute the exceptions the Supreme Court had indicated would make a fundamental difference and might save it from constitutional infirmity." *Baird* v. *Bellotti*, 450 F.Supp., at 1005. In common parlance, the pitcher was well ahead of the batter.

Unusual scrutiny is called for in these circumstances, giving the passage of time particular significance. Counsel's affidavit

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[13] Whether a defendant must bear full double charges when the court has permittted intervention by a party whose interests correspond with original plaintiffs, who remain in the case, would present a question. However, the court does not consider that question substantially affected by delay.

[14] Candor requires noting that error in one, relatively minor, aspect of our opinion did occasion it difficulty. *See Bellotti* v. *Baird*, 443 U.S., at 644 n.24, 99 S.Ct., at 3049 n.24.

makes apparent that one of the issues would be that of unneccesary duplication within his own office, a proper inquiry. *See, e.g., Copeland* v. *Marshall*, D.C. Cir., 1980, 641 F.2d 880, 891. There are 118 entries labelled "conference," apparently, mostly interoffice, and 48 for "telephone," many, seemingly, additional interoffice conferences. The affidavit lists four individuals who spent eighty or more hours apiece. This is in no way criticism of the quality of the product. The court requested, and has examined, PPLM's brief, and finds it excellent. However, it could be asked how much of it is more than a restatement—no doubt better phrased—of our prior opinions, 450 F.Supp. 998-1006; 393 F.Supp. 849-57. Perfection is not possible, and, at some point, fairness and diminishing returns dictate that charges be not further run up against an opponent. That point may well have been passed, but, more important, with the passage of time it will be more difficult to determine when it did.

The court returns to the practical problems of measuring what is a reasonable fee. One need ony turn to the careful examination called for by the lodestar rule as illustrated by *Furtado* v. *Bishop*, 635 F.2d, at 920-23, to appreciate the mounting difficulties of tardily recapturing and measuring services represented by 200 diary entries in addition to 166 for conferences and telephones, involving some seven attorneys. Even if successful, having in mind that the charged party must bear the costs, merely to require a longer hearing would constitute prejudice. Furthermore, the uncertainties of success, or even, perhaps, of knowing whether success has been fully achieved, are part of theproblem. Even disregarding *White* I's delay, the court sees more difficulties in all respects on the basis of PPLM's May 29, 1980 filing than would have been the case had the filing been the preceding fall, and feels so a fortiori if *White's* postponement is to be taken into account.

It is true, as PPLM says, that under the lodestar rule the initial burden is upon it to show the amount of time reasonably spent, as well as the appropriate rates. However, its suggestion, "Insofar as PPLM does have difficulties in proving some item in its fee claim—*e.g.*, an unexplained 'conference'—the

proper remedy is to disregard *the particilar time* attributed to that item, not to dismiss the entire claim," (ital. in orig.) is altogether too facile. This might apply to minor items, but where its diary entries show, generally, what was done and the time spent, a court would seem more likely to start with an assumption of reasonableness than to disregard altogether. The concept that delay is to the defendant's benefit would stand the principle of laches on its head. When the court in *White* III spoke of four and a half months as "not so extreme, given all the other circumstances . . . ase to neccessitate a finding that the request was untimely," clearly it was contemplating the likelihood of prejudice to the defendant, not to the plaintiff. The court here invisages no net benefit to the defendant.

This was a meritorious case, requiring, altogether, much work. The loss to plaintiffs, or their counsel,[15] is obviously very considerable. However, where a substantial delay has occurred, questions of fairness should be resolved against the parties that had the sole control. The court has pondered this matter deeply, but finds there is a probability of substantial prejudice, and concludes that the application of all plaintiffs for attorney's fees should be dismissed.

[5] The only question that remains is one that was not argued, whether this advance finding can be sufficient, or whether the court must conduct a necessarily elaborate fee heaing, and then determine whether, in fact, there was prejudice. The court answers this question by saying that a party guilty of an unexcused substantial delay should not be entitled to impose that great burden, and in this instance the court invokes the burden on itself and other litigants as well as that on the defendant.

This opinion does not cover other costs and expenses, which are left open.

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[15] All counsel have stated that their clients cannot afford to pay fees. This cannot increase defendant's obligation. Nor, since counsel were the ones who occasioned the delay, should it change the equities.

APPENDIX C

United States Court of Appeals

For the District of Massachusetts

Civil Action No. 74-4992-A

WILLIAM BAIRD, MARY MOE,
GERALD ZUPNICK, M.D.,
PARENTS' AID SOCIETY, INC. *et al.*
Plaintiffs, Appellants,

v.

FRANCIS X. BELLOTTI, Attorney General, *et al.*,
Defendants, Appellees.

JANE HUNERWADEL et al.
Defendants-Intervenors.

ORDER
February 6, 1984

The within case has been remanded to the district court for further proceedings, and I am mindful of Local Rule 8(i). Even if a substantial saving of time would be effected by my retention, I am concerned with the appearance of justice, and would not want to give either party cause to wonder whether my conduct of future proceedings was influenced by the degree that I might agree or disagree with the court's decision. The case is accordingly returned to the Clerk for reassignment.

ALDRICH
Senior Circuit Judge*

*Sitting by designation.

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*Sitting by designation.

United States District Court
For the District of Massachusetts

Civil Action No. 74-4992-A

WILLIAM BAIRD, MARY MOE,
GERALD ZUPNICK, M.D.,
PARENTS' AID SOCIETY, INC. *et al.*
Plaintiffs,

v.

FRANCIS X. BELLOTTI, Attorney General, *et al.*,
Defendants,

JANE HUNERWADEL et al.
Defendants-Intervenors.

MEMORANDUM AND ORDER
July 22, 1982

Because of the possible difficulties presented by the motions to dismiss, the court does not wish anyone to feel that any aspect has been slighted. The parties, accordingly, may proceed, with reasonable promptness, with such oral or written discovery and further briefing, if any, that they deem desirable on those issues, and shall notify the court that no, or no further such, is needed.

The parties shall bear in mind that reasonable, but only reasonable, fees in proving fees, if such be recoverable, may also be recovered. They are urged to confer on any factual matters and, possibly, on the question of settlement. In connection witht e latter, the court suggests, entirely without prejudice, that the 1976 Supreme Court reversal was brought about by broad, and supported only by his official position, representations by the Massachusetts Attorney General about Massachusetts law and the meaning of the statute, and a request for abstention, without which the case might well have

ended in 1976 and it may, accordingly, be wondered why, having called the tune the Commonwealth should not pay the piper.

In the meantime, defendants' motion for leave to file memorandum dated July 20, 1982 is allowed, and said memorandum is received for filing.

The court adds that is anyone wishes an oral hearing, its only available time will be 12 o'clock, Tuesday, September 7, after which the court will be going abroad, alternatively, 12 o'clock Monday, October 4.

By the Court

/s/ ALDRICH, SCJ